No. 11,457

United States
Circuit Court of Appeals
For the Ninth Circuit

ALVA ALEKSICH, as Administratrix of the Estate of Jakor Aleksich, Deceased,

Appellant,

vs.

MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, a corporation,

Appellee.

BRIEF OF APPELLEE

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Butte, Montana

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STATEMENT OF THE CASE

Alva Aleksich as Administratrix of the estate of Jakor Aleksich, deceased, brought an action in the District Court of the United States in and for the District of Montana, Butte Division, against this appellee, alleging diversity of citizenship (R. 2); that Jakor Aleksich died as the result of accidental injuries about one hour after an accident (R. 5); that Jakor Aleksich owned an insurance policy, in force at his death, insuring him against "all loss of time, commencing while said policy was in force, resulting directly and independently of all other causes from bodily injuries during any term of this policy through purely accidental means;" that the policy

contained no limitations "on indemnity for total loss of time;" that the policy was an "open policy as to indemnity for total loss of time" (R. 4); that there was due to the estate of Jakor Aleksich under the policy $24,374.91 (R. 7).

The defendant denied that there were no limitations in the policy on indemnity for loss of time; denied that the policy was open as to indemnity for loss of time (R. 22), and denied that the plaintiff was entitled to $24,374.91 or any other sum or amount (R. 25).

The matter was tried before the court without a jury, and the court found that the plaintiff was not entitled to any judgment against the defendant and ordered the action dismissed.

Judgment was entered for the defendant (R. 37) and the plaintiff appealed from the final judgment within the time allowed (R. 41-42).

QUESTIONS PRESENTED ON APPEAL

I.

Upon all of the record was the trial court correct in holding as a conclusion of law "That by virtue of the terms and provisions of the contract introduced in evidence as plaintiff's Exhibit 1, the said Jakor Aleksich was insured only against such loss of time resulting from bodily injuries causing disability (as) he sustained after infliction of such bodily injuries and prior to his death and was not insured against any loss of time resulting from his death?"

Although the Appellee doubts that the Appellant's first Specification of Error (R. 6) conforms with Rule 20 (d) of this Court (See: United States v. Cushman, 136 Fed.—2d—815,—1943), and Appellee believes that it raises no question to be determined, it will be treated in this brief as if it raised the question as stated above.

II.

Was the trial court bound by the decision of the Montana Supreme Court in Aleksich v. Mutual Benefit Health and Accident Association,.....Mont....., 164 Pac. (2d) 372, 162 A. L. R. 263 (1945)?

SUMMARY OF APPELLEE'S ARGUMENT

I.

THE DECEASED WAS INSURED FOR LOSS OF TIME ONLY BETWEEN TIME OF INJURY AND DEATH

This is neither a cause of action for death granted to an heir or beneficiary by Lord Campbell's Act, nor a cause of action for damages for personal injuries. This is a suit on an insurance policy providing benefits to the insured "at the rate of Forty Dollars for the first month, and at the rate of Eighty Dollars per month thereafter, but not to exceed twenty-four months," if such injuries as described in the insuring clause, do not result in any of the specific losses mentioned in "Part A" of the policy,

but "wholly or continuously disable the insured for one day or more." The defendant is not a tortfeasor, but is bound by a contract, which is governed by the law of contracts, not torts. No provision of the contract, nor any possible construction of it, makes provision for the benefits which the plaintiff claims.

II.

THE TRIAL COURT WAS BOUND BY THE CONSTRUCTION GIVEN THE POLICY BY THE MONTANA SUPREME COURT

No question of prior adjudication of this case is raised here. There is no question of res adjudicata. But it is the law of the United States since Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) that the Federal Court is bound by the interpretation of this contract given to it by the Montana Supreme Court, which has stated:

> "From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement for the death of the insured, or for loss of time resulting from death."

ARGUMENT

I.

First Specification of Error

The Appellant makes much of the fact that the doctrine of the "last antecedent" is recognized in Montana. By aid of that doctrine she would have the insuring clause of the policy divided into two parts after the words "through purely Accidental Means," and would have the clause "subject, however, to all the provisions and limitations hereinafter contained" modify and relate only to "and against loss of time beginning while this policy is in force and caused by disease contracted during any term of this policy."

The appellant's contention ignores important facts.

First, the construction of this contract does not require the application of the doctrine of the "last antecedent" since the intention of the parties is clearly expressed by the use of the word *"respectively"* appearing immediately before the clause "subject, however, to all the provisions and limitations hereinafter contained," and between it and the single clause which the appellant would have the last clause modify. The word *"respectively"* calls attention to and refers back to the first clause of the sentence also, concerning loss of limb, sight or time. The contention of the appellant gives no meaning whatever to the word *"respectively,"* but its presence in the sentence, and the only meaning it can be given are direct refutations of the appellant's theory.

Funk & Wagnall's New Standard Dictionary defines "respectively" as follows:

> "As singly or severally considered; singly in the order designated—."
>
> Martien v. Porter, State Auditor, et al., 68 Mont. 450, 479; 219 Pac. 817, 829 (1923).

It must, to be given any meaning at all, refer to more than one thing, and could properly refer only to the total group of losses enumerated.

The doctrine of the "last antecedent" is a rule of construction, and, as such, is to be used only where a document is ambiguous and in need of interpretation.

> Ulmen v. National Surety Co. of New York, 3 F. Supp. 348 (D. C. Mont. 1933);
> Dick v. King, 73 Mont. 456; 236 Pac. 1093 (1925);
> Brown v. Homestake Exploration Corporation, 98 Mont. 305; 39 Pac. (2d) 168 (1934).

There is no ambiguity about the insuring clause of the contract here involved. The word "respectively" emphasizes the fact that the last clause modifies both of those preceding it and not merely the latter one. In addition, the sentence is properly punctuated to indicate a reference to both prior clauses, even without consideration of the word "respectively." A restrictive clause must be set off by a comma, when it refers to several antecedents which are themselves separated by a comma.

> Tidal Oil Co. v. Roelfs, 77 Okl. 183; 187 Pac. 486, 487 (1920);
> St. Louis-San Francisco Ry. Co. v. Bengal, 145 Okl. 124; 292 Pac. 52, 53 (1930).

As the proper grammatical meaning, both as it is punctuated, and as emphasized by the word "respectively," is unambiguous, there is no need for construction, and the doctrine of the "last antecedent" has no application.

Application of the appellant's contention would lead her to consider not only the loss of time by reason of accident, but also loss of limb and loss of sight to be unlimited, as they are not in the clause to which the appellant says the qualifying clause applies. Using that reasoning, all of the provisions of the policy beginning with the bold typed heading "ACCIDENT INDEMNITIES" and continuing through "Part A" covering specific losses of limb or sight; Part "B," covering this case, and parts "C," "D" and "E" must be considered as no part of the policy and of no effect.

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."
>
> R. C. M. (1935) Section 7532.

Secondly, the doctrine of the last antecedent is not an arbitrary rule of law providing that relative and qualifying words, phrases and clauses are never to be applied to any but the word or phrase immediately preceding it. The true statement of the doctrine as set forth in State v. Centennial Brewing Co., 55 Mont. 500, 513; 179 Pac. 296, 299 (1919), cited by the appellant, is as follows:

> "By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding and are not to be construed as

> extending to or including others more remote, *unless such extension is clearly required by a consideration of the entire act.*" (Italics supplied.)

Such extension is required here by use of the word "*respectively,*" by the punctuation, and also by the tenor of the whole instrument.

Predicating her reasoning on the elimination of the word "respectively" and a misuse of the doctrine of the "last antecedent," the appellant contends that the policy is an "open policy" as to indemnity for loss of time caused by accident.

The appellant does not cite R. C. M. (1935) Section 8116, which defines an "open policy" as follows:

> "An open policy is one in which the value of the *thing* insured is not agreed upon, but is left to be ascertained in case of loss." (Italics supplied.)

The statute by its wording shows that insurance of persons is not contemplated. This policy covers a *person,* not a *thing.*

It is to be noted that the appellant has cited no case involving an "open policy." The appellee has searched diligently but has been unable to find any case or text which refers to an "open policy" except where the policy involves insurance of property rather than the insurance of persons. It is a fair inference that when neither party is able to find such a case or text that none exists.

In view of the fact that this definitely is not an "open policy" none of the cases cited by the appellant, referring to the measure of damages in tort actions, are applicable to this case.

The appellant refers in her brief (pages 7, 13 and 14) to distinctions between a statute giving the legal representative of a deceased person a right to prosecute a cause of action which the deceased possessed before death, and a statute specifying that the heir of a deceased person is the proper party to prosecute an action for his wrongful death. These statutes are not cited by the appellant, and the appellee believes they are irrelevant to this case. It is the position of the appellee that the insured owned no cause of action against this defendant at the time of his death, not that the plaintiff is not the proper party to bring an action if one had existed.

The appellant has intimated in her brief that there is a distinction to be made in this case between loss of time by reason of death and loss of time by reason of accident. We will show hereinafter that the Montana Supreme Court has considered and construed this contract fully, and, because it is an accident policy, and because the matter of loss of time is specifically confined by the contract to loss by accidental means, the Supreme Court of Montana has covered that matter, and must have considered it to make any construction of the policy. In addition, there is no merit to the attempted distinction. Contentions of this type have been made before in the history of American law, but not many of them. It is to be noted that the appellant has cited no case sustaining her theory.

In Rosenberry v. Fidelity & Casualty Co. of New York, 43 N. E. 317 (1896), the plaintiff, as administratrix, brought action to recover the weekly indemnity provided in

the policy although the insured died within twenty-four hours of his injury. The plaintiff's theory was that

> "the estate of said Rosenberry is entitled to recover indemnity for the loss of his services for a period not exceeding 52 weeks, amounting to $260, the same as the decedent would have been entitled to recover had he lived and continued to be totally disabled from said injuries for that period."

The court in that case said, at page 319:

> "If we should concede that when the decedent was killed he was totally 'disabled,' and was consequently prevented from following his usual occupation, the consequences claimed by counsel do not, by any means, necessarily follow. If the death of Jesse Rosenberry can be said to be the fulfillment of the letter of the contract, it is far from being within its spirit and meaning. To give the contract such a literal interpretation would be to lose sight entirely of the intention of the parties as indicated by the entire scope of the instrument."

An attempt to distinguish in this type of case between loss of time, or earning capacity, *by reason of death* from such loss *by reason of the injury,* is to attempt a distinction unfounded in fact or reason. In each of the following cases, just as in this one, an effort was made to obtain indemnity for loss of time or earning capacity for a period extending after the death of the insured. Whether the loss is referred to as caused by death or is referred to as caused by accident, but continuing after death, makes no difference, as the same reasoning applies in a determination of the plaintiff's right. In all of them the court

held that the plaintiff could not recover under a theory such as the appellant presents here.

> Dawson v. Accident Ins. Co. of North America, 48 Mo. App. 355, 24 A. L. R. 211 (1889);
>
> Shaw v. Equit. Mut. Acc. Ass'n, 5 Neb. 584, 99 N. W. 672 (1904);
>
> Hill v. Traveler's Ins. Co., 146 Iowa 133, 124 N. W. 898, (1910);
>
> Paul v. Fidelity & Casualty Co. of N. Y., 34 S. W. (2d) 978 (Mo. 1931).

The futility of attempting such a distinction is exemplified by the second conclusion of law of the trial court in this case, which, after the plaintiff had stressed her contention just as she has done upon appeal, worded its conclusion as follows:

> "—the said Jakor Aleksich was insured only against such loss of time *resulting from bodily injuries* causing disability (as) he sustained after infliction of such bodily injuries and *prior to his death* and was not insured against any loss of time *resulting from his death.*" (R. 40) (Italics supplied.)

It is apparent that the court could have used the words "continuing after his death" in place of the words "resulting from his death," and that such would have been more in keeping with the phraseology preferred by the appellant. But it is also apparent that they mean the same thing, and, the court having found the insured was covered for loss of time prior to his death only, it is unimportant whether the loss of time after death be referred to as "resulting from death" or "continuing after death."

Some effort is made by the appellant to predicate liability upon the caption appearing on the face of the policy and upon the back. The only cases cited by the appellant in regard to this matter are found at page 11 of her brief. The facts in each case are entirely different from those here in question. The case of N. Y. Life Ins. Co. v. Hiatt, 140 Fed. (2d) 752, which involved an endorsement on a policy, announced the principle that attention should be directed by the insurer to any provisions qualifying any statement in an endorsement calculated to catch attention. That principle is complied with in this case. It is also to be noted that the reverse of the court's reasoning in the Hiatt case, as to the thoughts which the insured might have had, is exemplified by the plaintiff's theory in this case. The average individual pays slight attention to the rules of punctuation, and it is doubtful that the lack of a comma in the heading of an insurance policy would so impress the insured that he would think immediately of the rule of the "last antecedent" and come to the conclusion that the policy was an "open policy" with regard to everything except loss of time by sickness. The Hiatt case was also predicated upon the principle that where a contract is partly written and partly printed, the writing controls, and that the rule embraces the use of a rubber stamp in lieu of writing. No such set of facts exists in this case. The other two cases, cited at page eleven of the appellant's brief, are not relevant to any issue in this case.

The wording of the caption is a short, very general statement of the scope of the policy. To ascertain the

contract made by the parties, anyone would naturally look to the provisions following and not merely at the caption. The specific clause stating the terms of the agreement appears directly below the caption in good-sized, legible type and clearly expresses the true agreement of the parties in plain, unambiguous, properly punctuated language.

The appellant attempts to enlarge this contract from one paying a maximum of twenty-four months indemnity as provided in part "B," amounting to $1,880.00, and for which Jakor Aleksich paid $21.50 the first quarter and $16.50 each quarter thereafter, to a policy indemnifying against loss of life and paying $24,374.91, and predicates her reasoning entirely upon punctuation of the caption and utter disregard of words and clauses of the contract which refute her contention.

In Holmes v. Phenix Ins. Co., 98 Fed. 240, 241 (1899), the court stated:

> "Punctuation is no part of the English language. The Supreme Court say that it 'is a most fallible guide by which to interpret a writing.' Ewing's Lessee v. Burnet, 11 Pet. 41, 54, 9 L. Ed. 624. The Century Dictionary tells us, what is common knowledge, that 'there is still much uncertainty and arbitrariness in punctuation.' It is always subordinate to the text, and is never allowed to control its meaning. The court will take the contract by its four corners, and determine its meaning from its language, and, having ascertained from the arrangement of its words what its meaning is, will construe it accordingly, without regard to the punctuation marks, or the want of them. The sense of a contract is gathered from its words and their relation to each other, and, after that has been done, punctuation may be used

to more readily point out the division in the sentences and parts of sentences."

The following authorities indicate that the intent of the parties as it appears from the whole instrument controls over a use of punctuation which might lead to a construction contrary to that intent, if rules of grammar alone were considered.

> "Punctuation, at best a most fallible guide, is always subordinate to the text and is never allowed to control its meaning."
>
> Stoddart v. Golden, et al., 179 Cal. 663; 178 Pac. 707, 708 (1919).

In that case, an appeal based solely on punctuation was held to be frivolous.

> "The punctuation of a document, although it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances."
>
> 13 C. J. Contracts, Sec. 494, page 535.

> "Relative and qualifying words and phrases, grammatically and legally, *where no contrary intention appears,* refer solely to the last antecedent.—This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application." (Italics supplied.)
>
> Lewis' Sutherland on Statutory Construction (2nd Ed.), Vol. II, Sec. 420, page 811.

As an application of these rules of construction, see General Accident, etc., Corp. v. Louisville Home Telephone Co., 175 Ky. 96, 193 S. W. 1031 (1917). The clause relied upon is the first quotation set out near the middle of the first column on page 1032, and, despite the absence of a comma, the modifying phrase is held to modify several antecedents. (See page 1033-5.)

See also:

12 Am. Jur. Contracts, Sec. 256, page 799.

The court may also supply punctuation where necessary to effectuate the true intent.

See:

Powers v. First National Bank of Corsicana, 138 Tex. 604, 161 S. W. (2d) 273, 281 (1942) pertaining to a will.

In Gordon v. Continental Ins. Co., 182 Okl. 240; 76 Pac. (2d) 1055, 1057 (1938), the court said:

> "Punctuation marks in a policy may be resorted to as an aid in construction, but do not necessarily control, and cannot change a meaning which can plainly be gathered from the words and their arrangement. 1 Couch, Ins. Law, Sec. 185; 13 C. J. 535."

See also:

17 C. J. S. Contracts, Sec. 306, page 723.

In Sirvint v. Fidelity and Deposit Co., 242 App. Div. 187, 272 N. Y. S. 555 (1934), the policy contained the following warranty:

> "The assured has not sustained nor received indemnity for any loss or damage by burglary, etc."

The court held that if the assured had sustained a burglary, this clause was violated, even though he had received no indemnity therefor, and then said, at page 557:

> "The intention would perhaps be even clearer if the clause 'nor received any indemnity for' were separated by commas. But the absence of punctuation is not fatal, where, even without punctuation the meaning is clearly expressed. * * * 'The words control the punctuation marks and not the punctuation marks the words'."

The appellant is asking this Court to take the following steps: (1) To create an ambiguity where none exists; (2) To read into the insuring clause after the words "resulting directly and independently from all other causes, from bodily injuries" the words "or death." This may not be done.

> Bishop v. Morrison-Knudson Co., et al., 64 Idaho 806; 137 Pac. (2d) 963, 968 (1943).

(3) Take out of the next to last line of the first paragraph of the insuring clause the word "respectively" and the commas found both before and after it; (4) Ignore the provisions of Part B and paragraphs 1, 7, 9, 10 and 11 of the standard provisions of the policy; (5) Write into the policy a provision indemnifying the loss of time ("by reason of death" as previously written in by appellant's counsel) as measured by the earning power of the deceased assumed at an undiminished rate over the period of his life expectancy and capitalized to find present value.

Plaintiff's theory does not amount to a construction of the contract which Jakor Aleksich had, but requires

the making of a new contract along the most beneficial lines plaintiff can imagine.

As well said by the Missouri court in Glenn v. Missouri Ins. Co.,.....Mo.....; 179 S. W. (2d) 644, 646 (1944):

> "Courts are not permitted to exercise their inventive powers for the purpose of creating an ambiguity where none exists."

The appellant is asking this Court to take no lesser step than that.

As to the comment on the advertising label:

> "Beware, Your policy with us is the best insurance you can buy,"

if the court will examine the original policy, it will see that there is nothing in that statement which would indicate to any insured anything except that was an advertisement by the insurance agent, which it shows upon its face it is. Only a portion of the sticker was pleaded by the plaintiff. In addition, it is to be noted that at page 4 of her brief appellant states that the defendant, in its answer, admitted that the words "Beware, etc.," were *endorsed* upon the policy. The defendant admitted that the words were *"pasted"* on the policy. In any event, no statement in the advertisement governs or limits the policy in any manner.

II.

THE TRIAL COURT WAS BOUND BY THE CONSTRUCTION GIVEN THE POLICY BY THE MONTANA SUPREME COURT

We now invite attention to the fact that the Policy before the Court has received consideration heretofore and has been construed in an action which required a construction of the Policy and its various provisions, including those now urged by appellant's counsel for a reversal of the judgment entered herein. The facts in the former case are identical with those in the case at bar; both cases arise as a result of contract between appellant and respondent, such contract being the policy Exhibit "A" (R. 7-17) and application for insurance (R. 17-21). The complaints differ somewhat in the form and amount of relief demanded, nevertheless both actions required a construction of the policy.

The case is Aleksich vs. Mutual Benefit Health & Accident Association, 164 Pac. (2d) 372, 162 A. L. R. 263 (1945), referred to in appellant's brief. In that action, plaintiff, now suing as administratrix, sued as the beneficiary named in the Policy and there sought a construction of the Policy, whereby she would be entitled to a judgment against respondent herein for damages based on indemnity of $40.00 for the first month and $80.00 for each of the succeeding twenty-three months. At page 372, 164 Pac. (2d), the Montana Court summarizes the complaint in the former case as follows:

> "The complaint alleges the issuance of the policy, with a copy thereof attached as an exhibit, together with a copy of the application therefor, wherein plaintiff is named as beneficiary. It further alleges the accidental injury of the insured while the policy was in effect, and his death within one hour after such injury, and that *because of such injury* and death, the said injured, Jakor Aleksich, was wholly and continuously disabled and caused thereby permanent and total loss of time." (Italics supplied.)

The foregoing claim was based upon "Part B" of the Policy. Counsel for plaintiff in that action are representing plaintiff in the present action. This is important only as demonstrating that counsel apparently are hopeful that by persistent and continuous litigation they may eventually obtain a construction of the Policy which will justify some recovery.

The Montana Supreme Court gave thorough consideration to every provision of the Policy, and in the course of its decision on page 374, said:

> "Plaintiff contends that the standard and additional provisions quoted above, constitute, inferentially, an agreement to indemnify, under Part B, against loss of time resulting from death of the insured."

and after a consideration of such contention, concluded:

> "We are convinced that the intention of the parties to the insurance contract was that the only indemnity contemplated was for loss of limb, sight, or time, and that such is the meaning and effect of the contract, as therein expressed. From a careful consideration of the entire contract we are unable to find any agreement of indemnity against, or promise of reimbursement *for death of the insured, or for loss of*

> *time resulting from death.* We are unable to read into the so-called 'standard' or 'additional' provisions referred to an undertaking by the insurer to pay compensation for either of such contingencies. The purpose of including that portion of the standard and additional provisions referred to insofar as they mention death of the insured does not appear. But they do not constitute an agreement to pay for death, or loss of time resulting from death, of the insured, and are meaningless so far as this contract is concerned. They are, if given the interpretation urged by appellant, inconsistent with the clear meaning of the contract and the apparent intention of the parties thereto, and will be disregarded." (Emphasis ours.)

The foregoing language definitely rejects the construction which plaintiff would now have this Court apply to the Policy.

We have quoted somewhat extensively from the decision of the Montana Supreme Court in order to demonstrate that every phase of the contract was by that Court considered in its conclusion that there was no liability under the Policy for death of the insured or for loss of time resulting from death.

The decision of the Montana Supreme Court is conclusive upon this Court and precludes any recovery by appellant in this action.

The law as decided in

> Erie R. R. Co. v. Tompkins, 304 U. S. 64, 78; 82 L. Ed. 1188, 58 S. Ct., 817 (1938)

admits of no other conclusion. The Supreme Court of the United States there said:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute *or by its highest court in a decision is not a matter of federal concern.*" (Italics supplied.)

and on page 79 the Court states:

> "The authority and the only authority is the state, and if that be so, *the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.*" (Italics supplied.)

In the case of Ruhlin vs. New York Life Insurance Company, 304 U. S. 202, 209, 82 L. Ed. 1290, 58 S. Ct. 860 (1938), the Supreme Court of the United States approving the rule in the Erie case said:

> "The parties and the Federal Courts must now search for and apply the entire body of substantive law, governing an identical action in the State Courts. Hitherto even in what were termed matters of 'general' law, counsel had to investigate the enactments of the State Legislature. Now they must merely broaden their inquiry to include the decisions of the State Courts, just as they did in a case tried in the State Court, and just as they have always done in actions brought in the Federal Courts, involving what were known as matters of 'local' law."

See also:

> Mutual Life Insurance Co. vs. Johnson, 293 U. S. C. 335, 79 L. Ed. 398, 55 S. Ct. 154 (1934).

The Supreme Court of Montana has decided that under the law of Montana Jakor Aleksich was not insured by

respondent under the policy here sued on for a period of twenty-four months after his death. If this Court, in the face of that decision, now construes the policy as holding that Jakor Aleksich was insured under the identical policy for his expectancy of life or a period of 16½ years after his death, such a construction would be diametrically in conflict with the construction placed upon the policy by the Montana Supreme Court. Under the U. S. Supreme Court decisions above cited, this Court is not privileged so to do.

We now invite attention to a brief reference to the complaint herein as originally prepared and filed. The Court will observe that in paragraph 6 thereof, counsel pleaded that the insuring clause made any indemnity to decedent "subject, however, to all of the provisions and limitations thereafter contained in the policy." It is true that the complaint was amended at the time of trial by striking said words from the complaint, but such amendment did not change the issues (R. 28). We then contended, and do now urge, and plaintiff's counsel when they prepared the complaint, must also have been of the opinion, that if plaintiff has a cause of action it must be based upon the policy as a whole, and that all of its provisions must be considered. That such is the law cannot be justly questioned. The policy is a part of the complaint; the clause in this paragraph above quoted is a part of the policy, and should not be ignored in construing the policy.

We are not here concerned, as hereinbefore stated, with a policy, the provisions of which are either ambiguous or

uncertain, neither are we concerned with a policy which does not, on its face, indicate clearly the kind of a policy it is, the indemnity provided for, and the conditions and loss insured against. Authorities construing policies of that kind are of no value in a determination of the questions here involved, and any further review of the same or comment thereon would only serve to prolong this brief.

Counsel's statement "The Montana Supreme Court has not spoken on the phases of liability presented here" (Appellant's Brief, p. 17) must be dismissed as not being supported by the facts. The decision of the Court effectively and conclusively refutes such statement. This is also true of appellant's contention here that in the argument before the Montana Supreme Court "no argument or citation of authority" was made concerning liability "in the other field." A reading of the Montana decision will disclose that the main cases cited in the brief of the appellant before this appellate court, particularly those in which policies of insurance were involved, were cited and considered by the Montana Supreme Court.

Counsel for appellant speak in their brief about the value of "obiter dictum," and with such value we are inclined to agree; nevertheless, we find that counsel immediately follow such citation by quoting from the decision of the Supreme Court of Montana what was purely obiter dictum and certainly nothing which can possibly be reconciled with or used as an authority for the position which the appellant here seeks to sustain.

We now come to a consideration of the quotations from 30 Am. Jur., found on page 19 of appellant's brief. With

the law as therein announced we have no quarrel, but the law of res judicata has no application to the facts in the case at bar. We are not here concerned with the application of that doctrine, but are concerned with the application of the rule announced in Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

CONCLUSION

The questions for determination by this court are: (1) The construction of the policy under consideration; and, (2) Is the construction of the provisions of said policy by the Supreme Court of Montana binding upon this Court. We contend that the construction placed upon the policy by counsel for appellant is not only at variance with that of the Supreme Court of Montana, but likewise does violence to the statutory rules of construction as contained in the Montana Codes and the decisions of the various courts of the country, wherein similar questions have been presented. As to our second contention, the authorities hereinabove cited announce the rule of law which is here applicable; namely, that the construction placed upon the policy here in question by the Supreme Court of Montana is binding upon this court as it was upon the Judge of the District Court. Judge Brown recognized and applied that law and rendered judgment accordingly. Such judgment should now be affirmed.

Respectfully submitted,

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